Supreme Court, U.S.
FILED
FEB 11 2000

(2)

No. 99-818

In the Supreme Court of the United States

GOVERNMENT OF GUAM EX REL.
GUAM ECONOMIC DEVELOPMENT AUTHORITY,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
DAVID C. SHILTON
ELIZABETH ANN PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15pp

QUESTION PRESENTED

1. Whether Section 28(b) of the Organic Act of Guam, 48 U.S.C. 1421f(b), requires the United States to transfer to the control of the Government of Guam lands that were reserved by the President of the United States in 1950 but have since been determined not to be needed for military use.

2. Whether the Government of Guam may assert against the United States claims to land on behalf of the aboriginal inhabitants of Guam.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982)	11
Cariño v. *Insular Gov't of the Philippine Islands*, 212 U.S. 449 (1909)	7
Massachusetts v. *Mellon*, 262 U.S. 447 (1923)	11

Statutes:

Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.*	9
Organic Act of Guam, ch. 512, 64 Stat. 384, 48 U.S.C. 1421 *et seq.*:	
§ 28, 64 Stat. 392, 48 U.S.C. 1421f	2-3
§ 28(a), 64 Stat. 392, 48 U.S.C. 1421f(a)	2, 3, 8
§ 28(b), 64 Stat. 392, 48 U.S.C. 1421f(b)	2, 3, 4, 5, 6, 8, 9, 10, 11
§ 28(c), 64 Stat. 392, 48 U.S.C. 1421f(c)	2-3, 5, 6, 10

Miscellaneous:

Exec. Order No. 10,178, 15 Fed Reg. 7313 (1950)	3

In the Supreme Court of the United States

No. 99-818

GOVERNMENT OF GUAM EX REL.
GUAM ECONOMIC DEVELOPMENT AUTHORITY,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 179 F.3d 630. The opinions of the district court (Pet. App. 23a-26a, 27a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1999. A petition for rehearing was denied on August 12, 1999 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 28 of the Organic Act of Guam of August 1, 1950 (Guam Organic Act), provided as follows:

> (a) The title to all property, real and personal, owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the inhabitants of Guam, including automotive and other equipment, tools and machinery, water and sewerage facilities, bus lines and other utilities, hospitals, schools, and other buildings, shall be transferred to the government of Guam within ninety days after *the date of enactment of this Act.*
>
> (b) All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after *the date of enactment of this Act,* is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable.
>
> (c) All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) hereof, or which is not placed under the control of the government of Guam by subsection (b) hereof, is transferred to the administrative supervision of *the head of the department or agency designated by the President under section 3 of this Act,* except as the

> President may from time to time otherwise prescribe: *Provided*, That *the head of such department or agency* shall be authorized to lease or to sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes.

Ch. 512, 64 Stat. 392 (emphasis added). That provision remains in effect, except that the italicized phrases in subsections (a) and (b) have been replaced with "August 1, 1950," and the italicized phrases in subsection (c) have been replaced with the phrase "the Secretary of the Interior." See 48 U.S.C. 1421f.

2. President Truman issued Executive Order No. 10,178 on October 30, 1950. See 15 Fed. Reg. 7313. That Order reserved to the United States various categories of real and personal property, including more than 42,000 acres of land. See *id.* at 7315; Pet. App. 4a, 30a, 64a-65a. That acreage appears to have included most, and perhaps all, of the land then owned by the United States in Guam. *Id.* at 46a-47a & n.9. For that reason, little if any land was actually transferred to the control of the government of Guam pursuant to Section 28(b). *Ibid.*

Between 1950 and 1991, the United States acquired additional land in Guam by condemnation and transferred slightly more than 4000 acres of unneeded land to the government of Guam. Pet. App. 4a-5a. In 1992 the Department of the Navy declared to be "excess" (a) 371 acres of land at Ritidian Point and (b) 15,571 acres of adjacent submerged land. *Id.* at 5a. The Navy transferred the 371 acres of dry land to the United States Fish and Wildlife Service for use as part of a wildlife refuge. *Ibid.* The submerged land was transferred to

the General Services Administration for later redistribution. *Ibid.* In April 1995, the Department of Defense published the "Guam Land Use Plan 1994," which identified another 8200 acres of land in Guam as land no longer needed for military purposes. *Ibid.*

3. In September 1995, the government of Guam (petitioner in this Court) brought this action against the United States and several federal agencies. Petitioner sought title to or control over three categories of land: the 371 acres at Ritidian Point, the 15,571 acres of adjacent submerged land, and 3553 acres of land that is currently administered by the Air Force but was identified as unneeded for military purposes in the Defense Department's Guam Land Use Plan 1994. See Pet. App. 31a. The gravamen of the suit is that Section 28(b) of the Guam Organic Act, 48 U.S.C. 1421f(b), imposes a continuing obligation on the United States government to relinquish control over any property in Guam that ceases to be needed for military purposes. See Pet. App. 7a, 33a. Petitioner also asserted a claim to the same lands based on a theory of "aboriginal title." See *id.* at 5a, 39a-40a.

The district court granted the United States' motion for summary judgment. Pet. App. 27a-56a. The court declined to resolve the question whether the doctrine of aboriginal title applies to Guam, based on petitioner's concession that proof of aboriginal title would not "mandate a present duty to transfer land." *Id.* at 39a-40a. The court rejected petitioner's claim under Section 28(b) of the Guam Organic Act, holding that Section 28(b), by its plain terms, contemplated a "one-time transfer" of property to the government of Guam. *Id.* at 44a. In the district court's view, Section 28(b) did not require that any lands reserved by the President within the 90-day period must be used for military purposes,

and it did not create a continuing duty to transfer reserved lands under any circumstances. *Id.* at 44a-45a.

The district court subsequently denied petitioner's motion for reconsideration. Pet. App. 23a-26a. The court again declined to determine whether the doctrine of aboriginal title applies to Guam. It explained that even if the doctrine did apply, the "United States, as title holder or trustee, would not be required to transfer any lands to [the government of Guam] as a substitute trustee." *Id.* at 24a.

4. The court of appeals affirmed. Pet. App. 3a-21a.

a. With respect to petitioners' claim under Section 28(b) of the Guam Organic Act, the court explained:

> The plain wording of § 28(b) establishes that Congress intended a one-time grant of property. Section 28(b) contains two interrelated clauses. The first clause gives the Guamanian government control over all property not already transferred to it under § 28(a). The second clause, however, conditions that grant on the President's not reserving the property within 90 days * * *.
>
> After 90 days, the condition was satisfied and the grant of property was complete: Guam owned or controlled all the property previously owned by the United States, except for the property that the President had reserved. Nothing in the wording of the statute suggests that § 28(b) has continuing force or that § 28(b) requires the United States to transfer all property that it owns in Guam that is no longer used for a military purpose.

Pet. App. 8a.

The court of appeals explained (Pet. App. 8a-9a) that its reading of Section 28(b) is supported by Section

28(c). The final clause of Section 28(c) states that where land has been reserved by the President under Section 28(b) and placed under the administrative supervision of the head of a department or agency, the department or agency head may lease or sell it "on such terms as he may deem in the public interest." 48 U.S.C. 1421f(c) (quoted at Pet. App. 9a). The court of appeals observed that the final clause of Section 28(c) "can have meaning only if Congress intended for subsection (b) to constitute a one-time grant of property. Under [petitioner's] reading of the statute, Congress' inclusion of the last clause is superfluous—the United States never could sell any property, because the property would revert to Guam automatically as soon as it was 'not needed for public purposes.'" Pet. App. 9a. The court noted as well that petitioner's reading of Section 28(b) would also undermine the President's authority under Section 28(c) to choose the department that will administer reserved lands. *Ibid.* Under petitioner's approach, the court explained, "the President could give control over [reserved] property to a non-military agency such as the Department of Education, but if that agency used the property for a non-military purpose, then the property would revert to Guam." *Ibid.*

b. The court of appeals also rejected petitioner's claim "that it is entitled to control some of the land at issue under the doctrine of 'aboriginal title.'" Pet. App. 19a. The court "assume[d], without deciding, that the doctrine of aboriginal title applies to the native inhabitants of Guam." *Ibid.* It observed, however, that "the right to aboriginal title belongs only to tribes and, in some circumstances, to individual members of tribes." *Ibid.* Because petitioner "is neither a tribe nor a tribal member," the court held, it "cannot claim any aboriginal right to use or occupy tribal land." *Id.* at 20a.

The court of appeals also rejected petitioner's related claim that petitioner could properly sue as trustee for the aboriginal inhabitants of Guam. The court explained that under the Constitution, the power to set national policy with respect to the treatment of aboriginal peoples is vested in Congress. Pet. App. 20a. The court recognized that Congress may delegate its trust authority, but it rejected petitioner's claim that the Guam Organic Act effects such a delegation. The court explained that "the Organic Act delegates authority over the property at issue to the executive branch of the federal government, not to the territorial government of Guam." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 10-14) that the decision of the court of appeals conflicts with this Court's decision in *Cariño* v. *Insular Government of the Philippine Islands*, 212 U.S. 449 (1909). That claim is wholly without basis. *Cariño* involved the claim of a native inhabitant of the Philippines to land that had been occupied and used by the claimant and his ancestors for an extended period of time. *Id.* at 455-456. The instant case, by contrast, presents no question concerning the circumstances under which a native inhabitant of Guam may assert a claim to land reserved by the United States.

The court of appeals in this case assumed, *arguendo*, that "the doctrine of aboriginal title applies to the native inhabitants of Guam." Pet. App. 19a. The court held, however, that the government of Guam has no

right under the Constitution or the Organic Act to assert such claims, either on its own behalf or on behalf of (unidentified) individual inhabitants. *Id.* at 20a. As we explain below (see pp. 10-11, *infra*) that holding is correct. But in any event, *Carino* has no bearing on the question of petitioner's right to assert aboriginal claims.[1]

2. Section 28(a) of the Guam Organic Act provides that all real and personal property "owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the inhabitants of Guam * * * shall be transferred to the government of Guam within ninety days after August 1, 1950." 48 U.S.C. 1421f(a). Section 28(b) states that "[a]ll other property, real and personal, owned by the United States in Guam, not reserved by the President

---

[1] Petitioner ultimately acknowledges (Pet. 12 n.13) that "the court of appeals did not reach the merits of the aboriginal claim." Petitioner's claim of a conflict with *Cariño* is apparently based on the assertion that the court of appeals "left undisturbed the ruling of the district court on this aspect of the case, which can only be understood as a holding that unextinguished aboriginal title cannot be asserted against the United States, at least in the face of a Presidential reservation apparently authorized by Act of Congress." *Ibid.* In fact, the district court did not hold that "aboriginal title cannot be asserted against the United States"; it simply recognized, in accordance with petitioner's own concession, that a claim of aboriginal title cannot provide the basis for a judicial order directing the United States to transfer land. See Pet. App. 39a-40a. But even if petitioner had accurately characterized the district court's holding, the court of appeals quite plainly declined to express any view regarding the circumstances (if any) under which a native inhabitant of Guam might assert a claim to the land at issue here. See *id.* at 19a-20a. Petitioner's claim therefore reduces to the assertion that the *district court's* analysis conflicts with *Cariño*—a patently insufficient basis for invoking this Court's review.

of the United States within ninety days after August 1, 1950, is hereby placed under the control of the government of Guam." 48 U.S.C. 1421f(b). By its plain terms, Section 28(b)'s effect is limited to property that was "not reserved by the President of the United States within ninety days after August 1, 1950." *Ibid.* That Section therefore cannot reasonably be read to effect a (belated) transfer of control of land that *was* reserved by the President within the 90-day period.

Petitioner contends (Pet. 16) that Section 28(b) is "open to construction" because it "fails to address" the question of "[w]hat happens to land expressly reserved by the President for military purposes in 1950 which later becomes surplus to the needs of the Armed Services." We agree that Section 28(b)—which is limited by its terms to property "not reserved by the President" within the initial 90-day period—does not address the proper treatment of land falling within the category that petitioner describes. But the fact that Section 28(b) does not resolve the question presented here does not create a gap or ambiguity in that Section. To the contrary, Section 28(b) is *unambiguously* irrelevant to any question concerning the appropriate treatment of property that *was* reserved by President Truman in the 1950 Executive Order.

Rather, the propriety of an inter-agency transfer in these circumstances is to be determined by reference to other provisions of law. The Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.* (Property Act), and implementing regulations govern the disposal of federal property deemed to be in excess of the needs of the federal agency charged with its administration. Neither Section 28(b) nor any other provision of the Guam Organic Act gives the government of Guam rights greater than those established by

the Property Act for States and other political subdivisions within whose boundaries federal reserved lands are released by the administering agency. There is consequently no basis for construing Section 28(b) to require that property reserved by the President in 1950 must be transferred to the government of Guam if it ceases to be needed for military purposes.[2]

3. Petitioner contends (Pet. 21-23) that the court of appeals erred in holding that petitioner could not assert a claim of aboriginal title on behalf of (unidentified) native inhabitants. Petitioner cites no decision of any court, however, that has permitted a state or territorial government to assert claims on behalf of native inhabitants in the absence of express statutory authorization. Petitioner does not identify any such authorization, and none exists. The court of appeals recognized that "Congress can delegate its authority over aboriginal land rights," but it correctly held that "the Organic Act

---

[2] Petitioner characterizes as "unanswerable" the question "Why would Congress want lands not needed for military purposes to go to Guam if found surplus immediately after enactment, but not if found surplus more than ninety days later?" Pet. 16. Petitioner's argument implicitly assumes that lands not needed for a military purpose in 1950 could not have been reserved for other purposes. But nothing in Section 28(b) restricted President Truman's authority in that manner.

As the court of appeals explained (Pet. App. 8a-9a), petitioner's interpretation of Section 28(b) would also place that Section in tension with Section 28(c), 48 U.S.C. 1421f(c). Section 28(c) authorizes the President to choose the department that will administer lands reserved under Section 28(b), and it authorizes the relevant department head to sell or lease those lands. Those grants of authority would be superfluous if Section 28(b) imposed a continuing duty to transfer reserved lands to the government of Guam when those lands cease to be needed for military purposes. See Pet. App. 9a.

delegates authority over the property at issue to the executive branch of the federal government, not to the territorial government of Guam." Pet. App. 20a.

Petitioner emphasizes (Pet. 23) that it "is not claiming for itself, but only as a specie of 'parens patriae,' prepared, in due course, to make appropriate disposition or dedication of the lands affected in accordance with a later determination of the true owners." It is well established, however, that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government," *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)), and petitioner offers no basis for concluding that a different rule should apply to the territorial government of Guam. Review of this issue is especially unwarranted, moreover, in light of petitioner's prior concession that proof of aboriginal title would provide no basis for a judicial order directing transfer of the relevant lands. See Pet. App. 39a-40a.

4. Contrary to petitioner's suggestion (Pet. 28), there is no meaningful likelihood that the Court's decision in *Rice* v. *Cayetano*, No. 98-818, will affect the proper disposition of this case. The decision in *Rice* may shed light on the question whether the status of native Guamanians is properly regarded as the same as or similar to that of Indians within the continental United States. But the court of appeals in the instant case did not express a view on that issue. Rather, the court decided the case on the grounds that (a) petitioner's statutory argument is foreclosed by the unambiguous language of Section 28(b), and (b) petitioner is not a proper party to assert claims of aboriginal title, either on its own behalf or on behalf of individual

Guamanians. Neither of those holdings is in any way implicated by the questions presented in *Rice*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
DAVID C. SHILTON
ELIZABETH ANN PETERSON
Attorneys

FEBRUARY 2000